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No. 94-981

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

O & G SPRING & WIRE FORMS SPECIALTY CO.,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether statistical evidence that gives rise to an inference of discrimination, is considered in conjunction with anecdotal evidence, and is not adequately rebutted, can support a finding of intentional discrimination in a disparate treatment case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether the evidence at trial was sufficient to support the district court's conclusion that respondent had proven intentional race discrimination.

3. Whether the district court abused its discretion by permitting the publication of a notice seeking to identify victims of petitioner's discrimination prior to fashioning a remedy.

4. Whether the Equal Employment Opportunity Commission's unsuccessful age discrimination claim against petitioner was "substantially justified" within the meaning of the Equal Access to Justice Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	11
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	14, 15
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	10
Bazemore v. *Friday*, 478 U.S. 385 (1986)	10
Chisholm v. *United States Postal Serv.*, 665 F.2d 483 (4th Cir. 1981)	13
EEOC v. *Chicago Miniature Lamp Works*, 947 F.2d 292 (7th Cir. 1991)	6, 9
EEOC v. *Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), rev'd, 467 U.S. 867 (1984)	13
EEOC v. *Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988)	9
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976)	10, 15
Hazelwood School District v. *United States*, 433 U.S. 299 (1977)	9, 11, 12
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	5, 9, 11, 12, 13, 14
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	13
Pierce v. *Underwood*, 487 U.S. 552 (1988)	10, 15-16
Wards Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989)	5
Williams v. *United States*, 112 S. Ct. 1112 (1992)	14
Zobrest v. *Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993)	14, 15

Statutes: Page

Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (1988 & Supp. V 1993) 2, 3
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* (1988 & Supp. V 1993) 2, 3
Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) 2, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 38 F.3d 872. The December 14, 1988, opinion of the district court (Pet. App. 39a-56a) is reported at 705 F. Supp. 400. The May 22, 1989, opinion of the district court (Pet. App. 57a-59a) is reported at 52 Fair Empl. Prac. Cas. (BNA) 1685. The January 26, 1990, opinion of the district court (Pet. App. 60a-65a) is reported at 732 F. Supp. 72. The February 26, 1990, opinion of the district court (Pet. App. 66a-70a) is reported at 52 Fair Empl. Prac. Cas. (BNA) 1689. The March 20, 1992, opinion of the district court (Pet. App. 71a-78a) is reported at 790 F.

Supp. 776. The July 2, 1992, opinion of the district court (Pet. App. 79a-81a) is reported at 61 Fair Empl. Prac. Cas. (BNA) 1224. The August 19, 1992, final order of the district court (Pet. App. 82a-97a) is unreported. The November 23, 1992, ruling of the district court (Pet. App. 98a-102a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1994. The petition for a writ of certiorari was filed on November 30, 1994. A motion to clarify or amend petition for writ of certiorari was filed on January 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Equal Employment Opportunity Commission (EEOC) sued petitioner O & G Spring and Wire Forms Specialty Company (O&G) alleging that petitioner engaged in a pattern and practice of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (1988 & Supp. V 1993), and age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (1988 & Supp. V 1993) (ADEA). Pet. App. 1a-2a. After a bench trial, the district court ruled in favor of the EEOC on the race discrimination claim and in favor of petitioner on the age discrimination claim. The district court denied petitioner's request for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) (EAJA), based on its conclusion that the EEOC's claim under the ADEA had been substantially justified within the meaning of EAJA. Pet. App. 99a-100a. The court of appeals affirmed.

1. Petitioner is a small company that manufactures wire springs and specialty forms. Pet. App. 1a. Approximately 35 of its employees work in the low-skilled "secondary department." *Ibid.* From 1979 to 1985, petitioner hired 87 persons for the secondary department—58 who applied by walking in off the street and 29 who were referred by word of mouth. Not one of the persons hired was black. *Ibid.*

On November 27, 1985, the EEOC filed suit against petitioner, alleging that petitioner was engaging in a pattern and practice of racial and age discrimination in recruiting and hiring in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the ADEA, 29 U.S.C. 621 *et seq.* Pet. App. 1a-2a. The relief sought included appropriate injunctive measures and back pay.

At the bench trial, the EEOC presented evidence that blacks constituted the largest group in the pool of persons who walked in looking for a job at O&G during the relevant time period of 1979 through 1985. The EEOC also submitted anecdotal evidence by four black persons that they had walked into O&G looking for a job, but had been rejected. Pet. App. 2a.

The EEOC also presented statistical evidence through expert testimony that, based on the 1980 census and EEO-1 reporting forms, 22.5% to 31.8% of the relevant labor market serving O&G was black.[1] Pet. App. 3a, 6a n.22. The EEOC's expert testified that these numbers probably underestimated black availability because the data only accounted for employed persons, whereas petitioner generally hired unemployed persons and blacks are overrepresented among the unemployed. *Id.*

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[1] Because petitioner's applicant records were incomplete, the EEOC could not rely on actual applicant flow data. Pet. App. 42a.

at 3a. Based on an availability range of 22.5% to 31.8%, the EEOC's expert calculated that the odds were "less than three in one million * * * that O&G would have hired no blacks into unskilled positions using a color-blind process." *Id.* at 46a.

Petitioner attempted to counter the EEOC's evidence by claiming that it hired no blacks for its secondary department from 1979-1985 because no blacks applied during its "hiring windows." Pet. App. 63a.[2] Petitioner also challenged the validity of the EEOC's statistical evidence, arguing that the statistics did not account for O&G's preference for hiring people with training or experience, or for the decision of individual blacks not to work in O&G's uncomfortable environment. *Id.* at 3a.

2. The district court bifurcated the liability issues from any remedy phase. In its initial opinion, the district court found O&G liable under Title VII on claims of both disparate treatment and disparate impact. Pet. App. 3a, 55a; see *id.* at 66a. The court recognized that statistical evidence is sufficient to establish liability under Title VII, *id.* at 53a-54a, but emphasized that an inference of discrimination based on statistics in a case such as this is "compelled not because Title VII requires a particular balance in an employer's work force or that the work force precisely 'mirror' the composition of the relevant labor market but rather because gross disparities between an employer's applicant flow, hiring or work force and its relevant labor market show the existence of discriminatory employment practices." *Id.* at 54a-55a,

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[2] Uncontroverted evidence showed that in the two years following the filing of this lawsuit, five of the 12 people hired by petitioner in the secondary department were black. Pet. App. 2a n.17. Petitioner offered a number of explanations for its sudden change in hiring patterns, all of which the EEOC disputed. *Ibid.*

citing *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977). The court reasoned that, in order to rebut the EEOC's case, petitioner would have had to show that the EEOC's statistics were inaccurate or insignificant, or establish that there was a "non-discriminatory explanation for the discriminatory results." Pet. App. 52a.

The court gave some credence to O&G's explanations about certain immigrants being drawn to work at O&G because of the company founder's own immigrant background, other employees' use of the same foreign language, and willingness to work under poor conditions, as well as to O&G's preference for employees with technical backgrounds. Pet. App. 49a. The court also found, however, that in order for there to be any sort of reasonable statistical probability that no blacks would have been hired, the availability of blacks in the relevant labor market would have had to be significantly lower and petitioner failed to demonstrate that fact. It found that the EEOC's anecdotal evidence demonstrated that blacks applied before 1987 in substantial numbers. *Ibid.* The court concluded that petitioner's explanations did not explain away the "inexorable zero" number of blacks hired during the relevant period. *Id.* at 55a. The court ruled that the EEOC's proof was sufficient to establish a pattern and practice of racial discrimination in violation of Title VII from 1979 through 1985. *Ibid.*

The district court found that O&G was not liable under the ADEA. Pet. App. 3a, 56a.

On January 26, 1990, the district court revised its opinion in light of *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), and two Seventh Circuit cases

interpreting that opinion.[3] The court reversed its earlier finding that the EEOC had prevailed on its disparate impact claim based on O&G's word-of-mouth recruitment. Pet. App. 62a-63a. However, the district court reaffirmed its finding that the EEOC had prevailed on its disparate treatment claim based on O&G's walk-in hiring practices. Walk-in hiring accounted for two-thirds of O&G's hires from 1979 through 1987. *Id.* at 63a. The court noted that the statistical probability, using standard deviation analysis, of no blacks being hired through walk-in hiring from 1979 until the EEOC's claim was filed in 1985 was "infinitesimal." *Id.* at 64a. Pointing to the EEOC's statistical and anecdotal evidence and the dramatic change in petitioner's hiring practices after the EEOC's claim was filed, as well as to petitioner's failure to offer alternative statistics, the district court reaffirmed its original conclusion that petitioner engaged in a pattern and practice of disparate treatment of blacks in its hiring practices from 1979 through 1985.[4] *Id.* at 65a.

On February 26, 1990, the district court issued its first opinion in the remedy phase. Pet. App. 66a-70a.

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[3] On May 22, 1989, the district court had amended its initial opinion in response to petitioner's post-trial motion. The court clarified that it had imposed the burden of proof on the EEOC and had found that its evidence was strong enough to overcome petitioner's rebuttal evidence by a preponderance of the evidence as required under *Teamsters*. Pet. App. 57a-58a.

[4] On March 20, 1992, the district court again reconsidered its opinion in the liability phase in light of the Seventh Circuit's decision in *EEOC* v. *Chicago Miniature Lamp Works*, 947 F.2d 292 (1991). The district court concluded that the EEOC's statistical evidence remained sound following *Chicago Miniature*, and affirmed its previous finding of intentional race discrimination in the hiring of walk-in applicants. Pet. App. 71a-73a.

The court granted the EEOC leave to publish a notice in area newspapers in order to locate possible victims of O&G's discrimination. *Id.* at 66a. The court rejected O&G's argument that publication was premature. The court noted that the number of claimants was relevant to determining the method of any back pay distribution and was significant in considering whether O&G could financially support back pay. *Id.* at 67a-68a. The court held that the EEOC must show that the potential claimants applied for work at O&G or would have applied in the absence of discrimination. *Id.* at 68a.[5]

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[5] The court subsequently issued two opinions setting forth the bases for its determinations at the remedy phase concerning the degree of the black hiring shortfall during the relevant period (Pet. App. 74a-75a), back pay calculations (*id.* at 75a-76a, 79a-80a), pro rata distribution (*id.* at 76a, 79a-80a), prejudgment interest (*id.* at 76a-77a, 80a-81a), and hiring of discriminatees (*id.* at 77a). On August 19, 1992, the court also issued a final order granting relief. *Id.* at 82a-97a.

The district court was faced with 451 claimants following the publication of the notice. Pet. App. 76a. The court calculated that O&G had a hiring shortfall of 17 blacks. *Id.* at 75a. Because the jobs at issue required only "minimal qualifications," the district court reasoned that it would be impossible to determine which of the 451 claimants would have been hired for the 17 spots. *Id.* at 76a. Accordingly, the district court held that back pay should be distributed on a *pro rata* basis among eligible class members. *Ibid.*

The court's final order set forth a procedure for determining which claimants were class members entitled to back pay and/or consideration for employment by petitioner. Pet. App. 84a, 86a-87a. The procedure permitted review by O&G of all claimants' forms, *id.* at 86a-87a, and for judicial review of unresolved disputes between the EEOC and petitioner with regard to the eligibility of individual claimants. *Id.* at 87a.

The dissenting opinion in the court of appeals asserts that the EEOC "did not bother to clean out the seemingly fraudulent claims" and states that "[a]pparently in this case some claimants

At the conclusion of the case, petitioner moved for attorneys' fees and costs under EAJA, 28 U.S.C. 2412 (d)(1)(A), with regard to the EEOC's unsuccessful claim under the ADEA. Pet. App. 98a-102a. The EEOC argued that its claim was substantially justified in light of the three types of evidence indicating age discrimination—petitioner's admissions on two separate occasions that it sought to hire younger persons, testimony by three applicants over 45 years of age who were not hired, and statistical evidence presented by an expert witness. *Id.* at 99a. The district court reasoned that, even though it ultimately found the EEOC's statistical ADEA evidence unpersuasive, the fact that a respected labor economist had considered the evidence to be probative of age discrimination indicated that the EEOC's claim was not such that petitioner was entitled to fees against the EEOC under EAJA. *Id.* at 100a.

3. The court of appeals affirmed. Pet. App. 1a-21a. The court first rejected petitioner's claim that there was insufficient evidence to support the district court's finding that it engaged in a pattern and practice of

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were in prison during the period when they supposedly would have applied * * * [and] [o]thers held better and higher-paying jobs." *Id.* at 33a. Petitioner repeats some of these assertions. Pet. 12. There is no record evidence to support them. Petitioner's counsel first voiced these assertions during oral argument before the court of appeals. Following the argument, petitioner's counsel filed a motion seeking leave to file a letter of clarification and apology for "any possible perceived misstatement" at argument by counsel concerning the applicants in this case who responded as a result of publication. See Letter dated Nov. 5, 1993, at 1. Petitioner's counsel indicated that some of his remarks inadvertently referred to matters related to another case and matters outside the record and he asked the court not to consider such matters. *Id.* at 2.

discrimination. The court pointed out that petitioner's contentions that statistics alone cannot prove intentional discrimination had been "firmly rejected by the Supreme Court and this circuit." Pet. App. 4a, citing *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977); *EEOC* v. *Chicago Miniature Lamp Works*, 947 F.2d 292, 299 (7th Cir. 1991); *EEOC* v. *Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988).

The court emphasized that "[r]eliance on statistical evidence by no means diminishes the plaintiff's obligation to prove discriminatory intent—but in some cases, statistical disparities alone may prove intent." Pet. App. 5a. The court reviewed in detail the statistical evidence in this case and concluded that the district court thoroughly weighed all the objections raised by petitioner. It concluded that "even the use of the most forgiving variables could not reduce the calculation of African-Americans in the relevant labor market to a level that would account statistically for O&G's failure to hire any African-Americans." *Id.* at 9a. The court also noted that the district court did not rely exclusively on statistical evidence, but considered the EEOC's anecdotal evidence as well. The court of appeals ultimately was "led to the same conclusion as the Court in *Teamsters* that in any event, fine tuning of the statistics could not have obscured the glaring absence of minorities . . . . The company's inability to rebut the inference of discrimination comes not from a measure of statistics but from 'the inexorable zero.'" *Ibid.*, quoting *Teamsters*, 431 U.S. at 342 n.23.[6]

[6] The court of appeals also rejected petitioner's claim that it had been subjected to an erroneously high burden of proof. The

Turning to petitioner's challenges to the remedy, the court of appeals concluded that the district court did not abuse its wide discretion to fashion a Title VII remedy by seeking to determine the size of the class before proceeding to fashion the remedy. Pet. App. 11a, citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-421 (1975). The court also rejected petitioner's challenges to the back pay award. Pet. App. 12a-13a.

Finally, the court of appeals affirmed the district court's refusal to award petitioner attorneys' fees with regard to the EEOC's unsuccessful ADEA claim. The court of appeals ruled that EAJA applies to the ADEA. After reviewing the record evidence as a whole, the court of appeals refused to conclude that the district court had abused its discretion in finding that the EEOC was substantially justified in pursuing its ADEA claim. Pet. App. 13a-21a, citing, inter alia, *Pierce* v. *Underwood*, 487 U.S. 552, 565-566 (1988).

Judge Manion dissented. Pet. App. 22a-38a. He believed that the EEOC had not introduced sufficient evidence and criticized the EEOC's anecdotal and statistical evidence. *Id.* at 23a-31a. He also criticized the district court's decision to permit publication of notice before determining the scope of the remedy. *Id.* at 33a. He believed that O&G was entitled to fees under

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court reasoned that, regardless of the suggestions by the district court regarding intermediate burdens of production, the only question to answer after a full trial was whether the plaintiffs proved discrimination by a preponderance of the evidence. Pet. App. 10a, citing, inter alia, *Bazemore* v. *Friday*, 478 U.S. 385, 398 (1986). The court concluded that the district court did not err in concluding that the EEOC had proven its case against petitioner by a preponderance of the evidence. Pet. App. 11a.

EAJA based on his view that the EEOC's claim under the ADEA was not substantially justified. *Id.* at 34a.

ARGUMENT

1. Petitioner contends (Pet. 14-15, 20) that the court of appeals' decision conflicts with rulings by other courts of appeals, claiming that the court here held that the fact that the employer hired no blacks required a finding of intentional discrimination. Petitioner also asserts (Pet. 15, 17, 23) that the court of appeals' decision conflicts with decisions by this Court and other courts of appeals that have held that proof of a motive or intent to discriminate is required to support a disparate treatment claim under Title VII.

Petitioner mischaracterizes the court of appeals' ruling. The court acknowledged that the force of statistical evidence in a given case will depend on the strength of the statistics. Pet. App. 5a-6a ("strong statistics may prove a case on their own, while shaky statistics may be insufficient unless accompanied by additional evidence"). The court also emphasized that a plaintiff alleging disparate treatment must prove discriminatory intent and that "[r]eliance on statistical evidence by no means diminishes the plaintiff's obligation to prove discriminatory intent." *Id.* at 5a. The court also correctly relied on *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977), to hold that discriminatory intent may, in certain circumstances, be inferred from the existence of gross statistical disparities between the number of blacks that an employer actually hires and the number that it would be

expected to hire in the absence of discrimination. Pet. App. 5a.[7]

The cases cited by petitioner (Pet. 14, 15, 20 n.12) do not suggest that strong statistical evidence, standing alone, is always inadequate to prove intentional discrimination in a pattern or practice case. Nor do the cases suggest that, in a pattern and practice claim of disparate treatment such as this, where the court considered the statistical evidence in conjunction with anecdotal evidence, see Pet. App. 9a, a finding of

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[7] In *Teamsters*, this Court observed that proof of gross statistical disparities, standing alone, may be used to establish a prima facie case of racial discrimination in jury selection cases. 431 U.S. at 339. The Court then held that "[s]tatistics are equally competent in proving employment discrimination." *Ibid.* The Court explained:

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

Id. at 339-340 n.20. Recognizing that the disparate treatment theory under Title VII requires proof of a discriminatory intent, this Court added that "[i]n many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." *Ibid.* (citation omitted). The Court repeated this conclusion in *Hazelwood*. 433 U.S. at 307-308 ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

intentional discrimination is precluded. See, *e.g.*, *EEOC* v. *Federal Reserve Bank*, 698 F.2d 633, 645 (4th Cir. 1983) (acknowledging that statistics alone may sometimes prove intentional discrimination), rev'd on other grounds, 467 U.S. 867 (1984); *Chisholm* v. *United States Postal Serv.*, 665 F.2d 482, 494-495 n.17 (4th Cir. 1981) (same).

2. Petitioner argues (Pet. 18-23) that the evidence in this case was insufficient to support the district court's finding of intentional race discrimination. Petitioner asserts (Pet. 18-19) that the EEOC's statistical evidence failed to account for petitioner's legitimate business reasons. Petitioner contends (Pet. 21, 22-23) that the evidence did not meet the requirements under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), of establishing discrimination against individual witnesses and demonstrating that they were not rejected because of the absence of job vacancies.

With regard to petitioner's legitimate business reasons, the court of appeals found that the district court took those factors into account when evaluating the EEOC's statistics. Pet. App. 4a n.20. After accounting for the legitimate business reasons, the district court found the statistics to be probative of discrimination. *Id.* at 49a, 55a. This factual finding was not clearly erroneous.

With regard to petitioner's invocation of the requirements of *McDonnell Douglas*, petitioner cites the discussion of that case by this Court in *Teamsters*. See Pet. 21, citing *Teamsters*, 431 U.S. at 358 n.44. The Court there clearly stated, however, that the *McDonnell Douglas* decision "did not purport to create an inflexible formulation" and that proof of Title VII violations will vary in differing factual situations. 431 U.S. at 358. The Court pointed out that *McDonnell Douglas* involved an

individual complainant seeking to prove one instance of discrimination. 431 U.S. at 358 n.44. The instant case, however, involves a pattern and practice claim. The *Teamsters* Court expressly held that, in such cases, means other than proof at the liability phase that each person for whom relief is sought was an individual victim, are appropriate to meet a Title VII plaintiff's burden of proof. 431 U.S. at 359-360 & n.45.

3. Petitioner includes (Pet. i) in its questions presented the issue whether the district court could properly require an employer to publish a notice to prospective victims. Petitioner, however, does not raise any legal arguments with regard to this issue in the body of its petition for certiorari. The question is therefore not presented by the petition. See *Williams* v. *United States*, 112 S. Ct. 1112, 1122 (1992) (issue must be "clearly presented" in petition for certiorari).

Petitioner has filed a motion to clarify or amend its petition for writ of certiorari in which it seeks to raise the publication issue. Petitioner did not, however, argue on appeal that the publication was unlawful or an abuse of discretion and did not seek reversal or remand with regard to the publication of notice issue. See Pet. App. 11a. Petitioner only challenged the publication of the class notice because it "might reach too broadly and would generate too many false claims to entitlement to relief" and sought reimbursement of the expenses of the publication. *Ibid.* Petitioner's challenge to the lawfulness of the notice publication was therefore waived. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). In any event, petitioner's argument lacks merit because the

district court did not exceed its "wide discretion" in determining the proper remedy in a Title VII case merely because it permitted publication of notice before, rather than after, determination of the scope of the remedy. See Pet. App. 11a (citing *Franks*, 424 U.S. at 763).[8]

4. Petitioner contends (Pet. 15, 24-27) that the Court should review its claim to attorneys' fees with regard to the EEOC's bringing of the ADEA claim so that the Court can correctly apply EAJA's "substantial justification" standard to this case. The decision of the court of appeals, however, is fully consistent with the standards that this Court established in *Pierce*, 487 U.S. at 565-566 & n.2. The Court there held that "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at

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[8] Petitioner also argues in a footnote (Pet. 21 n.14) that the district court's remedy phase did not follow the *Teamsters* provision that an employer be allowed an opportunity to contest each claimant's eligibility, and that, in any event, such a procedure is impractical for a small employer as a financial matter.

Petitioner ignores the fact that the district court established a procedure for petitioner to challenge each individual claimant's entitlement to relief at the remedy phase. See Pet. App. 84a-87a. The fact that petitioner did not take advantage of that opportunity, see Pet. App. 33a, does not establish that the procedure was inadequate, and petitioner's attempt now to explain why it did not challenge any of the claimants, Pet. 21-22 n.14, is not appropriate. To the extent petitioner's argument could be construed as a claim that class-wide relief was inappropriate in this case because petitioner is a small employer, petitioner waived such a claim because it never argued to the court of appeals that class-wide relief was improper. See *Zobrest*, 113 S. Ct. at 2466, quoting *Adickes*, 398 U.S. at 147 n.2.

566 n.2. The Court further held that a district court's decision on substantial justification should not be reversed unless the record "commands the conclusion" that the district court abused its discretion. *Id.* at 559, 570.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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